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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1971.

No. 6316.

ANDREW C. GOOSBY, et al.,
Petitioners,

vs.

MAURICE OSSER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondents

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Should the Federal Courts abstain from ruling where Petitioners have failed to exhaust their State remedies and where the Federal Courts can avoid an unnecessary determination of a constitutional question which might impair State functions?

2. Were Petitioners entitled to the convening of a three-judge court when the substantive constitutional challenge of their complaint was wholly insubstantial?

3. Did petitioners' cause of action constitute a case or controversy within the meaning of Article III of the United States Constitution?

COUNTER-STATEMENT OF FACTS.

Petitioners, who are untried detainees in the Philadelphia Prisons, filed a Complaint challenging the First-Class City Permanent Registration Act of March 30, 1937, P. L. 115, as amended, 25 Purdon's Statutes. Sections 623-1 et seq. and Pennsylvania Election Code, Act of 1937 P. L. 1333, Article 1, sec. 102, as amended by Act of August 13, 1963, P. L. 707, sec. 1, 25 Purdon's Statutes section 2602(w)(12), as unconstitutional on its face and depriving Petitioners and members of the class they represent of the right to register and to vote in Philadelphia County (Appendix p. 9).

On September 8, 1971, a law clerk on the staff of Community Legal Services inquired of Jack Welsh, Voting Registration Supervisor for the City of Philadelphia, whether he (Welsh) could send registrars to Holmesburg Prison for the purpose of registering untried detainees or to allow registration of these detainees by mail. The law clerk did not submit the names of such detainees nor did he state that he was inquiring on behalf of any particular detainee. Mr. Welsh stated that under the Pennsylvania Election Code he could not send registrars to the prison as registration must be held at a place accessible to the public. Nor were the detainees permitted to register by way of absentee registration since they did not qualify under the Registration Act as absentee registrants. On September 13, 1971, at 10:12 P. M., which was one hour and forty-eight minutes prior to the closing of registration period, Ann Torregrossa, Esq., requested Edward G. Mekel, Deputy Registration Commissioner for the City of Philadelphia, to send registrars to the county prisons to register untried detainees. This request was refused and thereupon Mr. Mekel was presented with affidavits to register seven detainees. Mr. Mekel refused to accept this request for registration and stated that unless the seven detainees appeared in person before a registrar or qualified as absentee registrants, he had no authority to register them.

The aforesaid seven detainees, through their attorney, filed an appeal with the City Commissioners in accordance with section 42 of the Registration Act (25 Purdon's Statutes sec. 623-42), on September 13, 1971 at approximately 10:30 P. M. The Chairman of the City Commissioners was out of the country and did not return for official duty until September 22, 1971. A hearing was held on September 28, 1971, after which the appeal was dismissed by the Commissioners. On October 4, 1971 petitioners filed a Petition for a Temporary Restraining Order, and Order to Convene a Three-Judge District Court, and a Preliminary Injunction. These Motions were presented to Judge E. Mac Troutman who held the matter in abeyance until October 6, 1971 for the purpose of giving the Respondents an opportunity to enter into a Stipulation with the Petitioners in order to dispose of this matter and not for the purpose of allowing the Philadelphia Respondents an opportunity to determine whether they would comply with the Stipulation by the Commonwealth of Pennsylvania that the state election laws were unconstitutional as applied to the Petitioners.

On October 6, 1971, Judge Troutman conducted a hearing on Petitioners' Motion for a Temporary Restraining Order. During the hearing the Commonwealth of Pennsylvania, (per J. Shane Creamer, C. Delores Tucker), through their attorneys stated that the registration and the election laws in question were unconstitutional and that the Commonwealth of Pennsylvania had no interest in denying Petitioners the right to register to vote. There was no written opinion issued by the Attorney General of Pennsylvania as to the constitutionality of the Acts in question. Following argument Judge Troutman dismissed the Petitioners' Complaint on the ground that the Court lacked jurisdiction to hear the case and the Attorney General of Pennsylvania said that the laws in question were unconstitutional and therefore there was no adversary proceeding before him. Accordingly the Motions were dismissed as well as the Complaint (Appendix p. 87).

On October 7, 1971, petitioners filed a Notice of Appeal and Motions for Injunction Pending Appeal and for the Convening of a Three-Judge Court. This matter was argued before the Court of Appeals for the Third Circuit on October 8, 1971. After argument the Motion for an Expedited Hearing was granted and the Motion for Temporary Injunction Pending Appeal was denied. The case was set down for oral argument during the week of October 18, 1971.

The panel of the Third Circuit to which the case was assigned notified the parties that it decided to dispense with oral argument on the matter. On October 26, 1971 the panel filed a Per Curiam Opinion affirming the decision of the District Court (Appendix p. 92). The Court of Appeals found that the substantive constitutional challenge of Petitioners' complaint was wholly insubstantial in light of *McDonald v. Board of Elections*, 394 U. S. 802 (1969). Therefore, there was no need for the District Court to convene a three-judge court. The Court of Appeals further held that the statute challenged by Petitioners was clearly constitutional.

On November 9, 1971 Petitioners filed with the Court of Appeals a Petition for Rehearing en Banc which was denied on December 17, 1971 (Appendix p. 93).

On March 10, 1972, Petitioners filed with this Court a Petition for Writ of Certiorari which was granted on June 26, 1972.

ARGUMENT.

THE FEDERAL COURTS SHOULD ABSTAIN FROM RULING, WHERE PETITIONERS HAVE FAILED TO EXHAUST THEIR STATE REMEDIES AND WHERE THE FEDERAL COURTS CAN AVOID AN UNNECESSARY DETERMINATION OF A CONSTITUTIONAL QUESTION WHICH MIGHT IMPAIR STATE FUNCTIONS.

Petitioners initiated legal process in the state courts when they complied with the Registration Act with reference to the Appeal from the refusal to register the seven (7) detainees. They took their appeal and had their hearing before the City Commissioners in accordance with the Registration Act (25 P. S. Section 623-42). The appeal having been denied, the proper procedure under the Registration Act was to file an appeal with the Court of Common Pleas of Philadelphia County.

Petitioners could, if the decision of the Court of Common Pleas was adverse, have perfected an appeal to the Supreme Court of Pennsylvania which under the circumstances of this case could have been requested to hear the matter as an expedited appeal. The Petitioners, therefore, had an adequate remedy at law and their rights would have been fully protected by the Pennsylvania State Courts.

The circumstances of this case are such that the Federal Court should abstain from impeding the State officials from exercising their appropriate function because of the "scrupulous regard for the smooth working of the federal judiciary." *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 501 (1941). The abstention doctrine is based upon two well-established principles. By awaiting State action, (1) The Federal constitutional question posed for Federal decision might become unnecessary; and (2) State Courts should be given the first opportunity to interpret

State statutes. *Railroad Commission of Texas v. Pullman*, supra, at 499-501.

In *Martin v. Creasy*, 360 U. S. 219 (1959), plaintiff sued in the United States District Court for the Western District of Pennsylvania and this matter was returned by the District Court to the Pennsylvania Courts to determine if there was an adequate remedy at law in the State Courts. The State Court declared that there was an adequate remedy but the District Court assumed jurisdiction and granted plaintiff's prayer for injunctive relief and a judgment declaring the Pennsylvania Limited Access Highway Act of May 29, 1945, P. L. 1108, Section 1, 36 P. S. Section 2391.1 unconstitutional. Plaintiff had alleged that the enforcement of the statute would deprive him of his property without due process of law, since the statute did not provide compensation for loss of access to highways. This Court stated that it is desirable (1) to avoid unseemly conflict between two sovereignties, (2) to avoid unnecessary impairment of State functions, and (3) to avoid premature determination of constitutional questions. The Court further stated that there was no reason to suppose that the Commonwealth of Pennsylvania would not accord full constitutional scope to the statute in question, and that "If, after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here" (255).

The Court held that:

> "It must be assumed that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights will be preserved. Assuming, however, that there was a basis to support intervention by a court of equity, the District Court should none the less have declined to adjudicate this controversy" (at 224).

Where the State Court's interpretation of the State statute or evaluation of its validity may obviate the need to

consider its validity under the Federal Constitution, the Federal Court should hold its hand lest it render a constitutional decision unnecessarily. *Meridian v. Southern Bell Telephone Co.*, 358 U. S. 639, 641 (1959).

The case of *Younger v. Harris*, 401 U. S. 37 (1971), dispelled any doubts about the viability of the abstention doctrine which may have been raised by *Dombrowski v. Pfister*, 380 U. S. 479 (1965) and its genre. This Court in *Younger* held that the possible unconstitutionality of a State statute "on its face" does not in itself justify an injunction against good faith attempts to enforce it. It was further stated:

> "The precise reasons for this long standing public policy against Federal Court interference with the State Court proceedings have never been specifically identified, but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that a court of equity should not act . . . when the moving party has an adequate remedy at law. . . ."

In this case, Petitioners initiated these proceedings in the State judicial system. The Registration Act provides machinery to have the issues determined by a State Court. Petitioners had adequate remedies at law without resorting to the federal judiciary. The question presented to this Court for determination involves the constitutionality of a State statute, which statute has not been ruled upon by the Supreme Court of Pennsylvania. There is no allegation of bad faith enforcement of the statute and the oral Opinion of the Attorney General of Pennsylvania makes it obvious that the State judiciary will accord full constitutional protection to the Petitioners. As Judge Troutman pointed out in his Opinion, we have a question which could be resolved by way of State action.

If petitioners are denied the right to vote improperly they have an adequate remedy at law which should be pursued in the proper forum.

THE PETITIONERS ARE NOT ENTITLED TO THE CONVENING OF A THREE-JUDGE FEDERAL COURT WHEN THE SUBSTANTIVE CONSTITUTIONAL CHALLENGE OF THEIR COMPLAINT IS WHOLLY INSUBSTANTIAL.

A Three-Judge Federal Court will not be convened pursuant to 28 U. S. Code Section 2281, when the claim of unconstitutionality is, "wholly insubstantial, legally speaking non-existent", or where "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." *Bailey v. Patterson*, 369 U. S. 31, 33 (1962). In its Opinion the Court of Appeals for the Third Circuit held that the substantive constitutional challenge of Petitioner's Complaint was wholly insubstantial in view of the decision of this Court in *McDonald v. Board of Elections*, 394 U. S. 802 (1969). The decision in the *McDonald* case clearly forecloses the constitutional question raised by Petitioners and leaves no room for the inference that the constitutional challenge raised by Petitioners can be the subject of controversy or the basis for the convening of a Three-Judge Federal Court.

Petitioners are laboring under the misapprehension that the Pennsylvania Election Code prohibits or denies to them the right to vote. If the Petitioners were able to visit the polling place in their residence district they would be entitled to vote in the same manner as other electors.

The Pennsylvania Election Code, Act of June 3, 1937, P. L. 1333, Article I, Section 102 as amended by the Act of August 13, 1963 Public Law Section 707 Section 1, 25 P. S. 2602(w)(12), 3146.1(pp) extends the privilege of voting to certain absentee electors. The Code provides that qualified electors in the following classes are eligible to receive absentee voting ballots. These classes are: (1) members of the military service and their spouses, (2) members of the merchant marines of the United States absent from the state or county and their spouses, (3) members of a re-

ligious or welfare group officially attached to the armed forces absent from the state or county and their spouses, (4) civilian employees of the United States outside the county and their spouses, (5) qualified war veteran electors bedridden or hospitalized due to illness or physical disability absent from the state or county, (6) any qualified elector who expects to be or is absent from the state because of duties occupational or business, (7) any qualified elector who is unable to attend his polling place because of illness or physical disability, (8) any spouse accompanying a person employed in the service of the Commonwealth of Pennsylvania or Federal Government in the United States in the event his duties, profession or occupation require him to be absent from the Commonwealth or his county of residence (25 P. S. 3146.1).

The above classes do not include untried detainees and, as a matter of fact, the Election Code setting up these classes states,

> Qualified absentee electors shall in no wise be construed to include persons confined in a penal institution or mental institution (25 P. S. §2602(w)(12)).

The claim raised by the appellants in *McDonald v. Board of Electors*, supra, is virtually identical with the claim raised by the Petitioners herein. In *McDonald*, the appellants and the class they represented were untried detainees awaiting trial in Cook County Jail. They were registered to vote at the time they applied for absentee ballots. They were refused absentee ballots because they did not come within the class for whom provisions for absentee voting had been made by the Illinois Legislature. Illinois had provided four classes of persons eligible for absentee voting ballots. None of these four classes specifically prohibited detainees such as the appellants in *McDonald* from obtaining absentee voting ballots. Since the Illinois statute did not include detainees in the eligible class, qualified to receive absentee ballots, the result was to exclude detainees

from obtaining such ballot. The Pennsylvania Election Code previously referred to specifically excludes detainees from obtaining absentee ballots. The municipal respondents submit that this constitutes a distinction without a difference. The issue clearly remains the same in both cases that detainees are not eligible for absentee voting ballots under the applicable state law. In *McDonald*, it was decided that this lack of providing for absentee ballots for detainees did not violate any of their constitutional rights. The same applies to the Pennsylvania Election Code provisions which specifically exclude detainees. There is no violation of any constitutional rights in so refraining from giving to them the opportunity to obtain absentee ballots. It is as this Court said in *McDonald* "it is not the right to vote that is at stake but a claimed right to receive absentee ballots" (p. 807).

Absentee voting statutes have been consistently construed as a privilege extending to electors and not an absolute right. As long as the statutes are not violative of the Equal Protection Clause and guarantee that all persons be treated alike under like circumstances or conditions, both in the privileges conferred and the liabilities imposed, there is no constitutional violation. *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U. S. 459 (1937). Only invidious discrimination is forbidden. *Reynolds v. Sims*, 377 U. S. 533 (1964), *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966). The threshold question this Court faced in *McDonald* was:

> "How stringent a standard he used in evaluating the classification made (by the Illinois Absentee Ballot provisions) and whether the distinction must be justified by a compelling state interest . . ." page 806.

A stringent compelling state interest test must be met in either of two situations, (1) the petitioner's right to vote was infringed, *Reynolds v. Sims*, supra, or (2) the statutory classification was drawn on the basis of wealth and race. *Harper v. Virginia*, supra.

Neither of these two conditions are present in this case. The Petitioners' right to vote is not infringed. The key question is merely whether they are entitled to an absentee ballot under valid state law. Furthermore, the classification is not drawn on the basis of wealth or race. It is clear as this Court said in *McDonald* that the statutory classifications must be upheld if they bear reasonable relationship to the legitimate state end. 394 U. S. at 808-809. The Pennsylvania legislature has legitimately sought to limit the privilege of absentee ballots so as not to provide absentee ballots to those incarcerated in the state prisons. While the detainees are clothed with the presumption of innocence they are nevertheless incarcerated because a committing magistrate has found a prima facie case to exist based on the charges brought against him and the amount of bail that has been set has either been not met or is too high for any person of reasonable means to meet at all. These two factors are certainly legitimate ends of the criminal justice system and the fact that they exist should not alter the manner in which the Pennsylvania Legislature can denominate who is and who is not entitled to an absentee voting ballot.

Petitioners set forth three distinctions that they claim exist between this case and the *McDonald* case. The first distinction is that Petitioners, unlike *McDonald* appellants are absolutely denied their right to vote. Municipal respondent submits that this is just not the case. Petitioners are precluded from obtaining an absentee voting ballot, there is no denial of their right to vote. They are in the same situation as the inmates in the *McDonald* case who also could not obtain an absentee ballot and therefore could not vote. The fact that the pretrial detainees could not or were not permitted by statute to post bail to effect a release from prison is not at all an issue in this case. This case revolves solely and only around the validity of the Pennsylvania Election Code provisions for absentee voting ballots. Any questions as to the rights to bail is not an

issue and cannot be an issue and is not determinative of this case. If the Petitioners seek to challenge the bail system as unconstitutional, that is their prerogative. However, such a challenge has not been made at this case.

The second distinction Petitioners raise is that the Pennsylvania absentee voting ballot, unlike the challenged Illinois Statute in *McDonald* draws lines on the basis of wealth and race. There is no distinction made in either statute, the Illinois or the Pennsylvania, on the basis of wealth or race. The absentee ballot provisions of the Pennsylvania Election Code apply to all inmates in prisons regardless of wealth or race. The fact that certain inmates may not be able to raise bail or that many of these inmates are of one race or another is irrelevant to the enforcement and application of the Election Code. The fact that the Illinois statute does not specifically exclude but rather does not include the detainees where the Pennsylvania statute specifically excludes them is irrelevant and cannot sustain the allegation that any distinction between the two cases exists at all. Petitioners' assertion that the Pennsylvania Statute discriminates on the basis of wealth and race is sophistry of the highest order.

The Pennsylvania Statute draws the same line as the Illinois Statute did: that is, certain classes of electors are eligible to vote by absentee ballot and all others white and black, poor and affluent who are incarcerated in prison cannot vote by absentee ballot.

Petitioners' third distinction that even if the classification drawn by the Pennsylvania Absentee Voting Statute are not tested by the compelling state interest test, there are significant differences between the *McDonald* case and the Petitioners' case raise a substantial constitutional question as to whether the Pennsylvania Statute invidiously discriminates against Petitioners, is not meritorious.

As aforementioned, there is no difference between the Illinois statute, which was subject to interpretation by the Court in *McDonald,* supra, and the Pennsylvania Election

Code provisions, which preclude detainees from obtaining absentee voting ballots. Therefore, the decision of this Court in *McDonald* is applicable to Petitioners' claim in this matter. There is no authority under 28 U. S. C. 2281 for the convening of a Three-Judge Federal Court.

PETITIONERS' CAUSE OF ACTION DOES NOT CONSTITUTE A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

It is readily apparent that no case or controversy exists between the parties so as to give jurisdiction to a Three-Judge Federal Court. The effect of Judge Troutman's Order dismissing Petitioners' Complaint was to return this matter to the Pennsylvania State Courts for determination. Petitioners make much of the fact that the Attorney General without the benefit of a written legal opinion orally stated that the Registration Act and the Election Code pertaining to absentee ballots, as same applies to the Petitioners, is unconstitutional. Petitioners sought to have the District Court declare these acts unconstitutional. Since the Attorney General has stated that Acts involved are indeed unconstitutional, there was no controversy before the District Court and therefore there was no issue for that Court to determine. This, in effect, removed the matter to the State Court to determine whether or not the local election officials, municipal respondents herein, are duty bound to follow the oral opinion of the Attorney General, and if they are so bound, it then remains the duty of the Attorney General to establish procedures as to the registration and absentee ballot voting under the "unconstitutional" sections of the Act involved. The District Court refused due to lack of expertise to set up standards and procedures which might be considered reasonable under the circumstances of this case.

The reasons given by the District Court for this are valid and should guide this Court in sustaining the decision of the Third Circuit Court of Appeals. The District Court said:

> "Now in effect we are being asked absent an opinion by the Attorney General, absent his recommendation as to proper procedures, absent his expertise and the expertise of those upon whom he may properly call, to declare this act unconstitutional and to establish our own procedures as to registration. Obviously, this Court is not endowed with the expertise to establish procedures which might be considered reasonable under the peculiar circumstances of this case, which might not be considered burdensome. Indeed even with the benefit of testimony, it is doubtful that we fairly and adequately develop a plan of registration on short notice demanded by parties" (App. pp. 83-84).

The District Court correctly thought that this matter was indeed within the purview of the State Courts and the Attorney General's Office, once the Attorney General has conceded that the Acts involved are unconstitutional. All that remains is that proper procedures be adopted by the State through the Attorney General's Office to comply with their determination that the Acts are unconstitutional and that Petitioners herein are entitled to the right to have absentee voting ballots.

The District Court further stated:

> "As competent and capable counsel in this case so well know, a controversy presented to the Court must be one that is appropriate for judicial determination. It must touch the legal relation of the parties having adverse legal interest. But there are no adverse legal interests as between the Commonwealth and the Plaintiffs. The adverse legal interests existing, if they do exist, as between the Plaintiffs and the Defendant Commissioners (the Municipal Respondents herein), who even to this day have not had the opportunity to react to a proper opinion by the Attorney General

such as was submitted in the student registration case, the business of the federal courts are limited to questions in an adversary context and in a form historically viewed as capable of resolution through the judicial process" . . . (Appendix p. 84).

"The Courts do not render advisory opinions. They require the presentation of concrete legal issues in actual cases. In view of the concessions made by the Attorney General, it is our belief that a substantial controversy between the parties having adverse legal interest does not exist" (App. p. 85).

The essential issue the Petitioners herein have raised is the constitutionality of certain provisions of the Pennsylvania Election Code covering absentee voting ballots. The Attorney General has conceded that these provisions are indeed unconstitutional. Nevertheless, the Attorney General has not since the beginning of this litigation issued a formal opinion as to the unconstitutionality of the statute. Whether or not the municipal respondents are bound by any opinion of the Attorney General as to the unconstitutionality of the statutes involved is not an issue here since no opinion of the Attorney General has been so issued. Nevertheless, the Attorney General could issue an Opinion and could institute procedures to insure that Petitioners herein and those of them like situate can indeed have absentee voting ballots. The only relief that the Petitioners have asked this Court to do is to send this matter back to a Three-Judge Federal Court for determination of the issues involved. If the Court does so, a Three-Judge Court will sit and, if Petitioners prevail, confirm the decision of the Attorney General that these acts are unconstitutional. This, municipal respondents submit, is not an appropriate role for a Three-Judge Federal Court to take. Once these acts are declared unconstitutional by Court action new acts will have to be instituted or new procedures to insure that Petitioners receive absentee voting ballots.

There clearly is no case or controversy between the parties in this matter nor is there adversity of interest between Petitioners and all defendants so as to give federal court jurisdiction of this matter. The District Court was correct in not convening a Three-Judge Federal Court to hear this case both based on the aforestated argument relative to the decision in *McDonald v. Board of Elections*, supra, and the fact that there is indeed no case or controversy between these parties since the main defendant, the Commonwealth of Pennsylvania, through its Attorney General's Office has conceded that the acts involved are unconstitutional. It is the burden of the state courts and the Attorney General and the state legislature to now remedy this situation to provide for a constitutional manner in which the Petitioners herein can obtain absentee voting ballots.

CONCLUSION.

THEREFORE for the foregoing reasons, the judgment, opinion and order of the Court of Appeals be affirmed because if the *McDonald*, supra, decision is proper the reversal of the judgment, opinion and order of the Court below would result in the law prohibiting directly what it has allowed indirectly.

Respectfully submitted,

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